

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR.

ORDER

Ashok Kumar Saxena. Versus M/s. Bhilwara Woolen Mills.

S.B. Criminal Misc. Petition No. 1003/2005

■ ■ ■

Ashok Kumar Saxena. Versus M/s. Bhilwara Woolen Mills.

S.B. Criminal Misc. Petition No. 1002/2005

and

Ashok Kumar Saxena. Versus M/s. Bhilwara Woolen Mills.

S.B. Criminal Misc. Petition No. 999/2005

Date of Order: August 10, 2006

PRESENT

HON'BLE MR. JUSTICE H.R. PANWAR

Mr. Sandeep Mehta, for the petitioner.
Mr. M.R. Singhvi, for the non-petitioner.

BY THE COURT:

The aforesaid three petitions under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code" hereinafter) involved common and identical questions of law and

facts and are between the same parties, therefore, with the consent of the learned counsel for the parties, they are being heard and decided by the common order.

The facts and circumstances giving rise to these criminal miscellaneous petitions are that the petitioner issued cheque No.008591 dated 15-5-1991 for a sum of Rs.40,000/- in Criminal Misc. Petition No. 1003/2005; Cheque No.008593 dated 27-5-1991 for a sum of Rs.40,000/- in Criminal Misc. Petition No. 1002/2005; and Cheque No.QNA 008594 dated 5-6-1991 for a sum of Rs.40,000/- and Cheque No. QNA 008595 dated 15-6-1991 for a sum of Rs. 27,000/- in Criminal Misc. Case No. 999/2005, all drawn on Punjab National Bank. The aforesaid cheques were said to have been issued by the petitioner in favour of the non-petitioner for discharge of liability. The cheques, on having been presented to the bank, were dishonoured and returned unpaid with the remarks/endorsement "referred to the drawer". For convenience, the facts emerging from S.B. Criminal Misc. Petition No. 1003/2005 are taken as the leading case. The communication with regard to dishonour of the cheques in Criminal Miscellaneous Petition No.1003/2005 dated 19-6-1991 was addressed to the petitioner by the non-petitioner vide EX.D/1. It appears that on assurance of the petitioner, the cheques were again sent to the bank for encashment, however the cheques presented to the bank

returned unpaid as having been dishonoured. A legal notice dated 17-8-1991 was sent to the petitioner demanding the cheques amount stating therein that the cheques amount be paid within fifteen days from the date of receipt of the notice otherwise the non-petitioner would be at liberty to file a complaint against the petitioner under Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act," hereinafter). Despite receiving the notice, the petitioner failed to pay the cheques amounts without the statutory period, therefore, the non-petitioner filed three separate complaints before the Judicial Magistrate No.3, Bhilwara (for short, "the trial Court" hereinafter). The trial Court took cognizance of the offences and issued the process against the petitioner. The petitioner appeared before the trial Court in pursuance of the process issued against him and filed applications dated 25.8.2004 stating therein that the cause of action to initiate proceedings under Section 138 of the . Act against the petitioner arises after expiry of fifteen days from the date of receipt of the communication dated 19-6-1991 (EX.D/1) and the non-petitioner, from the date of accruing the cause of action, within thirty days, failed to file the complaint under Section 138 of the Act and, therefore, requested the trial Court to drop the proceedings as being barred by the period of limitation. By the orders impugned dated 16-4-2005 passed in Complaint Cases

No. 106/2000, 103/2000 and 107/2000, the trial Court dismissed the applications filed by the petitioners in all the three criminal cases. Hence these criminal miscellaneous petitions.

I have heard learned counsel for the parties.

It is contended by the learned counsel for the petitioner that the communication Annx.D/1 dated 19.6.1991 amounts to notice under Section 138 of the Act and on expiry of fifteen days from the date of receipt of the said communication EX.D/1, the cause of action arose to the non-petitioner to file the complaint within the statutory period of thirty days, which the non-petitioner failed to file but the non-petitioner presented the cheques again to the bank for encashment and on being dishonoured and returned unpaid, he issued a notice through his counsel on 17-8-1991. According to the learned counsel, it was open for the non-petitioner to present the cheques again and again to the bank as long as the period of validity of the cheques existed but the cause of action, once accrued, has to be availed and if not availed then by a fresh notice, no fresh cause of action can be said to have accrued. Learned counsel has relied on a decision of the Hon'ble Supreme Court in Prem Chand Vijay Kumar Vs. Yashpal Singh & Anr., (2005) 4 SCC 417.

Learned counsel for the non-petitioner submits that the communication dated 19-6-1991 (Annx.D/1) is not a notice as envisaged under Section 138 of the Act but it is a

communication relating to the business transactions stating therein as to how the parties entered into the business, on what terms and conditions the parties transacted and the petitioner issued the cheques in favour of the non-petitioner and what was the understanding between them at the time of issuing the cheques as also the assurance of the petitioner and, therefore, the communication dated 19-6-1991 was nothing but a written intimation apprising the petitioner regarding the terms and conditions of the business as also to keep better business relations to honour the assurance given by the petitioner, therefore the communication dated 19-6-1991 does not fulfill the requirements of the notice as envisaged under Section 138 of the Act. It is further contended that it was the petitioner who assured the non-petitioner for keeping better business relations between the parties requested that the cheque may be presented to the bank again and for which he assured that he would arrange the funds and on this assurance, the cheques were presented to the bank for encashment and yet the same were dishonoured and, therefore, a legal notice through the counsel was sent on 17-8-1991 specifically fulfilling the requirements of Section 138 of the Act and asking the petitioner to pay the cheques amounts within fifteen days from the date of receipt of the notice and apprised him that failing to pay the cheques amounts within the stipulated period of fifteen days

from the date of receipt of the notice, the proceedings under Section 138 of the Act will be initiated against the petitioner in the competent court and requiring him to be responsible for all the losses and expenses thereof. Thus, according to the learned counsel for the non-petitioner, the notice dated 17-9-1991 is the notice under Section 138 of the Act and on expiry of fifteen days from the date of receipt of that notice by the petitioner, within thirty days, the complaints have been filed and, therefore, the trial Court was justified in dismissing the petition filed by the petitioner seeking quashing of the complaints.

I have given my thoughtful consideration to the rival submissions made by the learned counsel for the parties.

Section 138 of the Act reads as under:-

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

The Hon'ble Supreme Court, in Prem Chand Vijay Kumar Vs. Yashpal Singh & Anr. (supra), held that Clause (a) of the proviso to Section 138 of the Act does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after some time, on his own volition or at the request of the drawer, in expectation that it would be encashed. The primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally, is taken out of compulsion and not choice. On each

presentation of the cheque and its dishonour, a fresh right- and not a cause of action accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his such right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque.

The background facts filtering out details before the Hon'ble Supreme Court were that the complaint was filed by the appellant therein alleging that in the year 1995, respondent No.1 had issued a cheque for a sum of Rs.5,15,053.72p. Representing balance amount payable to the appellant therein for supply of goods to a partnership firm of which the respondents were partners. It was indicated that the total amount payable was Rs.49,12,482.72p as against which the accused persons had paid Rs.44,06,429/-, leaving balance of Rs.5,15,053.72p. A cheque drawn on Oriental Bank of Commerce, Ladwa Branch (Account No.954) was issued for the same amount on 27-1-1995, The cheque was signed by respondent No.1 therein i.e. Yashpal Singh, for the firm and respondent 2 Nirpal Singh, was a partner of the partnership firm, namely, M/s Sat Guru Rice Traders, New Delhi. The cheque was dishonoured due to inadequacy of funds in the account. Intimation was given on 6-2-1995. Notice was issued by the appellant demanding payment by lawyer's notice dated 17-2-

1995. The amount was not paid. The respondents requested the appellant for some time to make the payment. On the request of the respondents, the cheque was again presented on 6-7-1995 and it was again dishonoured due to inadequacy of funds. Intimation in this regard was sent to the appellant on 10-7-1995. Again, lawyer's notice was sent on 24-7-1995. Reply was sent by the respondents on 10-8-1995 refuting the allegations contained in the legal notice. The complaint was lodged on 28-8-1995. Charges were framed. The Hon'ble Supreme Court held that on expiry of fifteen days from the date of receipt of the notice dated 17-2-1995, the cause of action to file the complaint arose and within the statutory period, the complainant failed to file the complaint and, therefore, the Hon'ble Supreme Court did not interfere with the judgment under challenge by holding that the proceeding initiated on the basis of the complaint was not maintainable.

The facts of the case in Prem Chand Vijay Kumar Vs. Yashpal Singh & Anr. (supra) and the facts in the instant case are totally different. In the instant case, the communication dated 19-6-1991 was not a lawyer's notice and even otherwise, from the reading of the communication, it is made clear that it was a communication which normally takes place between the parties transacting the business with regard to payment, mode of payment, goodwill, reputation of business transacting parties

etc. At any rate, the communication dated 19-6-1991 does not fulfill the requirements of Section 138 of the Act as nowhere stipulates that the cheques amounts were to be paid within fifteen days from the date of receipt of the said communication failing which, on expiry of fifteen days period of communication, the petitioner would be liable for the action and expressing the intention to file complaint under Section 138 of the Act. If the contention of the petitioner is accepted that the communication dated 19-6-1991 amounts to a notice under Section 138 of the Act, then it lacks the requirements of Section 138 of the Act to the extent that the said communication nowhere demands the cheques amounts to be paid by the petitioner within fifteen days from the date of receipt of such communication and, thus, even if that communication is treated as a notice then too it does not fulfill the requirements of Section 138 of the Act to the extent that it does not provide the payment of the cheques amounts within fifteen days from the date of receipt of such communication and, therefore, had the complaint been filed treating the said communication as a notice, it could have been said by the petitioner himself that no cause of action arose. In this view of the matter, the decision relied on by the learned counsel for the petitioner turns on its own facts and, therefore, it is of no help to the petitioner.

In view of the afore-mentioned. matter, I do not find

any force in all the three criminal miscellaneous petition and they are dismissed. The ad interim stay orders dated 5-7-2006 passed in these three miscellaneous petitions are vacated and the stay petitions stand dismissed.

(H.R. PANWAR), J.

mcs